

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

MICHAEL T. FLYNN,

Defendant

Crim. No. 17-232 (EGS)

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL AND FOR AN ORDER TO SHOW CAUSE**

On December 1, 2017, defendant Michael T. Flynn entered a plea of guilty to a single count of knowingly and willfully making material false statements to the Federal Bureau of Investigation (“FBI”) regarding his contacts with the Government of Russia’s Ambassador to the United States (“Russian Ambassador”) during an interview with the FBI on January 24, 2017 (“January 24 interview”), in violation of 18 U.S.C. § 1001(a)(2). Prior to his guilty plea, the government provided to the defendant information that could arguably be construed as exculpatory to that offense. The defendant subsequently waived any right to additional discovery, as part of his guilty plea. Thereafter, this case was reassigned to this Court, which issued a Standing Order governing disclosures to the defendant. *See Standing Order, United States v. Flynn*, No. 17-cr-232 (D.D.C. Feb. 16, 2018) (Doc. 20) (“Standing Order”).

Notwithstanding the defendant’s waiver, the government provided more than 22,000 pages of additional discovery to the defendant. On December 18, 2018, the Court engaged in an “extension … of the plea colloquy.” Hearing Transcript at 5, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 18, 2018) (“12/18/2018 Hearing Tr.”). During this inquiry, the defendant specifically denied having “any concerns that potential *Brady* material or other relevant material”

had not been provided to him. *Id.* at 8. The Court found that the defendant's earlier guilty plea was entered "knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel." *Id.* at 7.

The defendant now files a motion to compel production of alleged *Brady* material and requests that the Court issue an order to show cause why the government should not be held in contempt for failing to comply with the Court's Standing Order. In so doing, the defendant misstates the facts of the case and misrepresents the nature and extent of the discovery that the government has provided. The defendant likewise misapplies *Brady v. Maryland*, 373 U.S. 83 (1963), seeking information that goes well beyond what could be favorable and material to his guilt or punishment. The defendant predicates much of his request on conspiracy theories, demanding that the government engage in a fishing expedition for documents that could offer support for those theories. Irrespective of whether such documents exist, a fact that the government does not concede here, the defendant fails to establish that such information is relevant—let alone favorable and material—in this criminal case.

Prior to addressing each of the defendant's requests in the body of this motion and attached appendix (Appendix A), the government sets forth the scope of its disclosure obligations, as appropriately cabined by the defendant's relevant conduct and the Court's considerations at sentencing. Next, as relevant to the defendant's requests and allegations of misconduct, the government details the extent and nature of its discovery productions to the defendant. As described herein, far from engaging in misconduct in this case, the government has complied, and will continue to comply, with its discovery and disclosure obligations, including those imposed pursuant to *Brady* and the Court's Standing Order. Therefore, the motion should be denied, and this case should proceed to sentencing.

## BACKGROUND AND STATEMENT OF FACTS

A. Summary of the Defendant's Relevant Conduct

The defendant's sweeping *Brady* demand mischaracterizes what constitutes favorable and material information in the context of the false statements charge to which the defendant has pleaded guilty, and the aggravating conduct on which the government intends to rely at sentencing. As described in the Statement of Offense, this case is about multiple false statements that the defendant made to multiple Department of Justice entities. *See Statement of Offense, United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 1, 2017) (Doc. 4) ("SOF"). Specifically, the defendant pleaded guilty to "willfully and knowingly" making material false statements about his communications with the Russian Ambassador during an interview with the FBI on January 24, 2017. Information, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Nov. 30, 2017) (Doc. 1). The defendant's false statements concerned (i) conversations with the Russian Ambassador beginning on December 29, 2016, about the defendant's request that Russia refrain from escalating the situation in response to U.S. Sanctions against Russia; and (ii) conversations with the Russian Ambassador beginning on December 22, 2016, regarding the defendant's request that Russia vote against or delay a United Nations Security Council resolution. *See* SOF at ¶ 3-4.

In addition, in the Statement of Offense, the defendant admitted making other false statements on multiple documents that he filed on March 7, 2017, with the Department of Justice pursuant to the Foreign Agents Registration Act ("FARA"), which pertained to a project that he and his company worked on, beginning in July 2016, for the principal benefit of the Republic of Turkey. *See* SOF at ¶ 5. As the defendant acknowledged, in the filings he omitted the material fact that officials from the Republic of Turkey provided supervision and direction over the project, and made materially false statements. *See id.* Although the Information to which the defendant pleaded guilty did not reference FARA, the conduct was included because of its

relevance for sentencing, as described in the Statement of Offense, Presentence Investigation Report, and in the parties' sentencing submissions. *See* Government's Memorandum in Aid of Sentencing at 3-4, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 4, 2018) (Doc. 46) ("Gov't Sent'g Memo"); Defendant's Memorandum in Aid of Sentencing at 7, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 11, 2018) (Doc. 50) ("General Flynn does not take issue with the description of the nature and circumstances of the offense contained in the Government's sentencing memorandum and the Presentence Investigation Report").

There is no other criminal conduct to which the defendant has admitted guilt or on which the government intends to rely at sentencing.<sup>1</sup> This case does not involve, and the government does not ask that the Court consider at sentencing, an allegation that the defendant was "an agent of Russia." *See, e.g.*, Motion to Compel the Production of *Brady* Material and for an Order to Show Cause at 2, 6 (Request ##18, 20), *United States v. Flynn*, 17-cr-232 (D.D.C. Aug. 30, 2019) ("Mot. to Compel"). It does not involve conduct or communications before July 2016. *See, e.g.*, Mot. to Compel at 4-6 (Request ##8, 15, 16, 27). It does not involve allegations that the defendant *always* lied to the government about his foreign contacts. *Cf., e.g.*, Mot. to Compel at 2-3. It does not involve National Security Agency databases. *See* Flynn Brief in Support of Motion to Compel Production of *Brady* Material and for an Order to Show Cause at 8, *United States v. Flynn*, 17-cr-232 (D.D.C. Aug. 30, 2019) (Doc. 109) ("Brief in Support"). And it does not involve allegations about leaking classified information—by the defendant or others. *See, e.g.*, Mot. to Compel at 7 (Request #35); Brief in Support at 8.

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<sup>1</sup> Based on filings and assertions made by the defendant's new counsel, the government anticipates that the defendant's cooperation and candor with the government will be contested issues for the Court to consider at sentencing. Accordingly, the government will provide the defendant with the reports of his post-January 24, 2017 interviews. The government notes that the defendant had counsel present at all such interviews.

B. The Government Complied with *Brady* and the Standing Order, and Disclosed Arguably Exculpatory Information Before the Defendant Pleaded Guilty

The defendant’s motion mischaracterizes what, how, and when discovery has been provided, and the nature of that discovery. It ignores that the government provided arguably exculpatory information to the defendant before his guilty plea on December 1, 2017, omits that the defendant waived the right to additional discovery as part of that guilty plea, and avoids mention that the defendant and his counsel represented to the Court—moments before he was scheduled to be sentenced—that the government had satisfied its *Brady* obligations. As detailed below, the government has fully complied with its disclosure obligations under *Brady* and the Court’s Standing Order.

*Brady* requires the government to disclose all evidence that is “favorable to an accused . . . where the evidence is material either to guilt or punishment.” See, e.g., *United States v. Bagley*, 473 U.S. 667, 667 (1985). Before the defendant first pleaded guilty, the government provided the defendant and his counsel information in its possession that could arguably be construed as exculpatory—some of the very information that the defendant now claims is being withheld. In late November 2017, the government provided the defendant with the FBI report for the defendant’s January 24 interview. On November 30, 2017, before the defendant signed the plea agreement, the government made additional disclosures. It disclosed that as part of the Department of Justice (“DOJ”) Inspector General’s (“IG”) review of allegations regarding actions by the DOJ and FBI in advance of the 2016 election, the IG identified electronic communications of one of the agents who interviewed the defendant on January 24, 2017, former Deputy Assistant Director (“DAD”) Peter Strzok, that showed a preference for one of the candidates for President. The government further relayed to defense counsel that those communications were part of the IG’s review, including the IG’s assessment as to whether those

communications constituted misconduct by DAD Strzok. Additionally, the government informed defense counsel that DAD Strzok said that the defendant had a sure demeanor and did not give any indicators of deception during the January 24 interview, and that both of the interviewing agents had the impression at the time that the defendant was not lying or did not think he was lying. In response to these disclosures, the government answered questions from defense counsel.

With all of this information, the defendant and his counsel signed the plea agreement on November 30, 2017. In other words, before the defendant and his counsel signed the plea agreement, they knew that that IG was investigating one of the interviewing agents for misconduct, they knew that the interviewing agents believed the defendant did not give indicators of deception during the interview, and they possessed the January 24 interview report. The defendant and his counsel subsequently agreed to “waive certain rights afforded by the Constitution of the United States and/or by statute or rule,” including “the right to any further discovery or disclosures of information not already provided at the time of the entry of your client’s guilty plea.” Plea Agreement at 6, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 1, 2017) (Doc. 3) (“Plea Agmt”). The defendant also affirmed that “I am pleading guilty because I am in fact guilty of the offense identified in this Agreement.” *Id.* at 10.

On December 1, 2017, the defendant pleaded guilty before the Honorable Rudolph Contreras, pursuant to the signed plea agreement. At the start of the hearing, Judge Contreras explained to the defendant that as part of his plea he was “going to be giving up a number of your rights, both statutory and constitutional, so it is critical that you understand everything that goes on here because I have to determine at the end whether you have given up those rights knowingly, voluntarily, and with the advice of your counsel.” Hearing Transcript at 3, *United States v. Flynn*, 17-cr-232 (D.D.C. Dec. 1, 2017) (“12/1/2017 Hearing Tr.”); *see also id.* at 9

(“You would have the right to challenge the government’s case against you by seeking to have the charges dismissed or having the evidence against you suppressed or thrown out. Do you understand you would have that right if you did not waive them?”). The defendant was then sworn in, and indicated that he wished to waive those rights. *Id.* at 3, 12. The defendant also affirmed that he accepted and agreed to the terms of the plea agreement. *Id.* at 19. At the end of the hearing, the defendant pleaded “[g]uilty,” because he is “guilty and for no other reason[.]” *Id.* at 30.

Following the defendant’s guilty plea before Judge Contreras, the case was randomly reassigned to this Court, which entered an initial Standing Order. On February 16, 2018, the Court entered a new Standing Order because the earlier order was a “prior version” that had been inadvertently entered. *See* Standing Order. In its February 16 Order, the Court explained that it entered the Standing Order because it does so “in every criminal case.” *Id.* The Standing Order requires the government to produce “any evidence in its possession that is favorable to the defendant and material to either the defendant’s guilt or punishment.” Standing Order at 2. With respect to cases that are resolved pursuant to a guilty plea, such as this one, the Court ordered the government to produce “any exculpatory evidence in the government’s possession.” *Id.* at 2-3. That obligation does not extend to impeachment evidence. *See id.* at 3 n.1; *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (government not required “to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant”).<sup>2</sup>

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<sup>2</sup> While the government is not contesting the applicability of the Standing Order here, it notes that “[c]riminal defendants may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver.” *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008) (citations omitted); *accord United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009); *see also Ruiz*, 536 U.S. at 629-30 (2002) (“A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel ....”). *See also United States v. Taylor*, 254 F. Supp. 3d 145, 159-60 (D.D.C. 2017) (concluding that the defendant could not rescind his otherwise-enforceable waiver of a

Five days after the Standing Order was issued, on February 21, 2018, the Court entered a Protective Order Governing Discovery. *United States v. Flynn*, No. 17-cr-232 (D.D.C. Feb. 21, 2018) (Doc. 22). A few weeks later, on March 13, 2018, the government began its extensive production of additional documents to the defendant. The government's production of materials comprises over 22,000 pages of documents, the overwhelming majority of which (over 21,000 pages)<sup>3</sup> pertain to the defendant's false statements on his March 7, 2017 FARA filing. The remainder are disclosures relating to the defendant's false statements to the FBI on January 24, 2017.

Contrary to defendant's assertions, the government has provided and will continue to provide all information in its possession favorable and material to guilt and punishment. The government is not in possession of *Brady* evidence that we "have repeatedly failed to produce." Brief in Support at 3. Nor has the government "affirmatively suppressed evidence (hiding *Brady* material)." *Id.* at 4. Remarkably, the supposed "suppressed" evidence cited by the defendant concerns Strzok's text messages with former FBI attorney Lisa Page. *Id.* at 12. The defendant's motion, however, conspicuously fails to mention that the government informed the defendant about those text messages and their import on November 30, 2017, *before* the defendant signed the plea agreement and before that information was publicly available. Later, the government informed the defendant that it had learned that there were additional text messages that it did not have at that time, and pledged to provide the defendant access to the messages when they became available. When those new text messages became available, the government ensured the

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right to further discovery where he had failed to demonstrate a valid reason to set aside his plea agreement), *appeal dismissed*, No. 17-3055, 2018 WL 4099683 (D.C. Cir. July 23, 2018).

<sup>3</sup> Most of the over 21,000 pages are productions that the government received from individuals connected to the defendant's FARA filings.

defendant had access to them. And when the government later came in possession of still more text messages, it provided text messages pertaining to the defendant that were not available to the public. Accordingly, far from suppressing evidence, the government provided timely and continuous information about the text messages—all of which the defendant and his counsel had in their possession before the proceeding on December 18, 2018, at which the defendant confirmed his guilty plea.

The defendant's complaints and accusations are even more incredible considering the extensive efforts the government has made to respond to numerous defense counsel requests, including to some of the very requests repeated in the defendant's motion. For instance, the defendant alleges that former FBI Deputy Director Andrew McCabe said, "'First we f\*\*k Flynn, then we f\*\*k Trump,' or words to that effect;" and that Deputy Director McCabe pressured the agents to change the January 24 interview report. *See Mot. to Compel at 4, 6 (Request ##2, 22).* Defense counsel first raised these allegations to the government on January 29, 2018, sourcing it to an email from a news reporter. Not only did the government inform defense counsel that it had no information indicating that the allegations were true, it conducted additional due diligence about this serious allegation. On February 2, 2018, the government disclosed to the defendant and his counsel that its due diligence confirmed that the allegations were false, and referenced its interview of the second interviewing agent,<sup>4</sup> who completely denied the allegations. Furthermore, on March 13, 2018, the government provided the defendant with a sworn statement from DAD Strzok, who also denied the allegations.

Nevertheless, on July 17, 2018, the defense revived the same allegations. This time, the defense claimed that the source was a staff member of the House Permanent Select Committee

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<sup>4</sup> The name of the second interviewing agent remains under seal.

on Intelligence (“HPSCI”). The HPSCI staff member allegedly told the defendant that the second interviewing agent had told the staff member that after a debrief from the interviewing agents, Deputy Director McCabe said, “F\*\*k Flynn.” Once again, the government reviewed information and conducted interviews, and once again confirmed that the allegations were completely false. And after defendant and his counsel raised the accusation for a third time, on October 15, 2018, the government responded by producing interview reports that directly contradicted the false allegations. Despite possessing all of this information, defense counsel has again resurrected the false allegations, now for a fourth time. *See Mot. to Compel at 4, 6 (Request ##2, 22).*

Tellingly, the defendant’s motion makes no mention of the defendant’s scheduled sentencing hearing on December 18, 2018, which occurred after the government’s voluminous production described above. That omission could be explained by the fact that the defendant and his counsel indicated at that hearing that they did not believe that the government had failed to provide *Brady* or helpful information. At the outset of the hearing, the Court indicated that it needed to “first ask Mr. Flynn certain questions to ensure that he entered his guilty plea knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel.” 12/18/2018 Hearing Tr. at 7. The defendant was then sworn in, and answered a series of questions from the Court. For instance, when asked by the Court, the defendant declined to withdraw his plea based on the fact that DAD Strzok was being investigated for misconduct (which the defendant knew before his initial guilty plea). *Id.* at 8-9. And when the Court asked if the defendant had “any concerns that you entered your guilty plea before you or your attorneys were able to review information that could have been *helpful* to your defense,” the defendant responded, “No, Your Honor.” *Id.* at 8 (emphasis added). The defendant also declined the Court’s invitation to speak with his attorneys in a private room about the Court’s questions or to

have the Court appoint “an independent attorney to speak with [the] defendant, review the defendant’s file, and conduct necessary research to render a second opinion for [the defendant].”

*Id.* at 9.

The Court then asked specific questions of the defendant’s counsel about discovery. The Court queried whether his counsel had “any concerns that potential *Brady* material or other relevant material was not provided to you,” to which counsel responded, “No, Your Honor.” *Id.* at 10. And when the Court questioned whether the defendant was “entitled to any additional information that has not been provided to you,” counsel again responded, “No, Your Honor.” *Id.* at 10-11. Only after the Court exhaustively questioned the defendant and his counsel about discovery, did the Court ask the defendant if he would like to proceed to sentencing, “[b]ecause you are guilty of this offense,” to which the defendant responded, “Yes, Your Honor.” *Id.* at 16.

Even after the Court’s thorough inquiry into the voluntary nature of the defendant’s guilty plea, the government has continued to produce information to the defendant and his counsel beyond the scope of the Court’s Standing Order. When the government learned that another government agency intended to produce to Congress documents pertaining to the defendant, it provided 330 pages of those documents to the defendant as a courtesy. The production largely consisted of the defendant’s questionnaires to obtain a security clearance and Department of Defense directives, and included no new information that was relevant to the defendant’s false statements to the FBI on January 24, 2017.<sup>5</sup>

Additionally, when the defendant’s counsel demanded a security clearance, the government informed counsel about the Classified Information Procedures Act (“CIPA”) and

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<sup>5</sup> The fact that the defendant passed a polygraph test in 2016, which the defendant and his counsel highlight in their motion, is not relevant to the defendant’s false statements in this case, all of which occurred after that test was administered. See Mot. to Compel at 3.

*United States v. Yunis*, 867 F.2d 617, 623-24 (D.C. Cir. 1989) (“classified information is not discoverable on a mere showing of theoretical relevance . . . discovery in this context further requires that a defendant . . . [demonstrate] that [it] is at least ‘helpful to the defense.’”), and invited defense counsel to make a specific request for classified information pursuant to *Yunis*. While the government was still awaiting a response to that email, defense counsel filed the instant motion and requested that the government be held in contempt. *See Brief in Support* at 3.

As the above history of discovery makes clear, far from engaging in misconduct in this case, the government has gone above and beyond its obligations to comply with the Court’s Standing Order and to respond to the defendant’s questions and requests.<sup>6</sup>

## ARGUMENT

Notwithstanding his valid and enforceable waiver of discovery, the defendant now seeks 49 additional categories of information, none of which he is entitled to under the law. As described below, the majority of his requests are either irrelevant, or seek information that has already been provided to him. Ultimately, the motion is a fishing expedition. *See Mot. to Compel* at 9 (“The only way to achieve justice in this case is to provide transparency and *full disclosure of all information relevant to the defense of Mr. Flynn.*”) (emphasis added); *see also Brief in Support* at 13 n.15 (seeking access to a classified information that may be “relevant” to the defendant). But *Brady* does not require an open file policy. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)”; *United States v. Caro-Muniz*, 406 F.3d 22,

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<sup>6</sup> In separate filings, the defendant has alleged other instances of government misconduct that likewise have no basis in fact. *See, e.g.*, Supplemental Status Report, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Sept. 30, 2019) (Doc. 121). The government will respond to each such allegation at the appropriate time.

29 (1st Cir. 2005) (“*Brady* does not permit a defendant to conduct an *in camera* fishing expedition through the government’s files . . . .”); *Kasi v. Angelone*, 300 F.3d 487, 504 (4th Cir. 2002) (“Nor does the *Brady* right to obtain exculpatory evidence equate to a right to rummage through governmental files.”). “Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence.” *Taylor v. Illinois*, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

To the extent the defendant’s request concerns information that is favorable and material to his guilt or punishment, the government has already provided the requisite information. At this point in the proceedings, the defendant’s guilt is not at issue. *See, e.g.*, Status Conference Transcript at 16, *United States v. Flynn*, 17-cr-232 (D.D.C. Sept. 10, 2019) (“9/10/2019 Status Conf. Tr.”) (“I can’t say right now exactly where it’s headed, but I don’t think it’s going to be a motion to withdraw the plea”). He has pleaded guilty before one federal judge, and affirmed his guilty plea before a second federal judge (this Court). Accordingly, as the Court stated on September 10, 2019, the operative question is whether the requests would produce information helpful to the defendant’s punishment at sentencing. 9/10/2019 Status Conf. Tr. at 10 (“analysis will focus on whether [the materials] are relevant and helpful with regard to Mr. Flynn’s sentencing”). Once again, the government has provided, and will continue to provide, all such information.

A number of the defendant’s requests seek access to classified information that may or may not exist. The discovery standard for classified information largely reflects the standard imposed in the Standing Order—it must be helpful to the defense. The discovery of classified information is governed by Section 4 of CIPA, 18 U.S.C., appx. III (2000). Although this “Section creates no new rights of or limits on discovery of a specific area of classified information . . . [,] it contemplates an application of the general law of discovery in criminal

cases to the classified information based on the sensitive nature of the classified information.”

*Yunis*, 867 F.2d at 621. Accordingly, to the extent that a defendant seeks documents and information that are classified, the District of Columbia Circuit imposes an additional requirement. Specifically, the court has held “that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information . . . [demonstrate] that [it] is at least ‘helpful to the defense.’” *Id.* at 623 (citation omitted).

I. Material Requested by the Defendant That Is Favorable and Material to Punishment Has Been and Will Continue to be Produced

As described above, the foundation for identifying *Brady* material is the defendant’s guilt and punishment. *See* Standing Order at 2. With respect to guilt, the relevant criminal conduct concerns the defendant’s false statements to the FBI on January 24, 2017. With respect to punishment, the relevant criminal conduct includes the defendant’s false statements in his FARA filings about the Turkey project. Additionally, information that undermines the defendant’s knowing and willful state of mind when he made those false statements are pertinent to punishment. With that foundation, the government below categorically addresses the defendant’s requests. The government also attaches an appendix responding to each individual request. *See* Appendix A.<sup>7</sup>

A majority of the defendant’s requests pertain to materials that are not relevant to his false statements to the FBI on January 24, 2017, his false FARA filings about the Turkey project, or other legitimate sentencing considerations. For example, numerous requests involve

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<sup>7</sup> The government’s responses to the defendant’s requests are not intended to, and should not be read to, concede the existence of such information in the government’s holdings or attest to the veracity of the statements or allegations in the requests.

individuals who are not connected to the criminal case, such as Christopher Steele and Bruce Ohr. The report from Steele does not involve allegations connected to the defendant's criminal conduct; it contains allegations that occurred before the defendant ever spoke with the Russian Ambassador in December 2016. Similarly, the defendant's requests for information pertaining to whether he was an agent of Russia are irrelevant. *See, e.g.*, Mot. to Compel 5-6 (Request #18, 20). The defendant is not charged with being an agent of Russia and the government has never alleged in this case that he was an agent of Russia. His criminal conduct pertains to false statements about his communications with Russian officials, not his affiliation with that country. Nevertheless, even if the allegation were relevant, the government has already provided the defendant with information in discovery that would undermine the contention that he was an agent of Russia.

Many of the requests pertain to information in interview reports about meetings or discussions that occurred before or after the January 24 interview. In particular, some requests concern discussions at the FBI about conducting the interview, *see, e.g.*, Mot. to Compel at 5-9 (Request #18, a., b., i.), and debriefs from the interviewing agents that occurred after the interview, *see, e.g., id.* (Request #19, a., c., d., e., f.). The government has already provided the defendant with relevant information about those discussions and debriefs. Those disclosures include interview reports of DAD Strzok and the second interviewing agent, a memorandum from Deputy Director McCabe describing his call with the defendant on January 24, 2017, and interview summaries of persons who participated in the discussions or debriefs.<sup>8</sup> The

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<sup>8</sup> As previously communicated to the Court and raised by the defendant as an issue for the first time, in some instances the government provided summaries of interviews, rather than the interview reports themselves. *See Brief in Support* at 13. Many of those interview reports contain privileged material, including classified information. Additionally, the majority of the interview reports are either not relevant to this case or could not reasonably be construed as favorable and material to the defendant's guilt or punishment. Information in those reports that

government also communicated to the defendant on November 30, 2017, before he signed the plea agreement, that DAD Strzok said that the defendant had a sure demeanor and did not give any indicators of deception during the interview, and that both interviewing agents had the impression at the time that the defendant was not lying or did not think he was lying. The documents provided by the government also show that the FBI asked the defendant for permission to conduct the interview, informed the defendant about the topic of the interview, interviewed the defendant in his own office, and afforded him multiple opportunities to correct his false statements by revisiting key questions. *See Memorandum of Andrew McCabe dated January 24, 2017 (Doc. 56-1); FD-302 of Peter Strzok dated July 19, 2017 (Doc. 56-2).*

While the government has thus already provided discovery relating to these requests for information about meetings or discussions that occurred before or after the January 24 interview, they are not—either collectively or individually—favorable and material to the defendant’s sentencing. Whether or not the FBI or DOJ contacted members of the White House before the defendant’s January 24 interview has no bearing on whether the defendant lied to the agents during that interview. Nor do any communications that the FBI or DOJ had with members of the White House after the interview, since by then the crime had already occurred.

Multiple requests pertain to the text messages between DAD Strzok and Page. *See, e.g., Mot. to Compel at 4-7 (Request ##6, 9, 10, 30, 31).* As described in detail above, the government informed the defendant about the text messages and their import before he signed the plea agreement on November 30, 2017, including the fact that one of the agents, DAD Strzok, was under investigation for misconduct because of those text messages. The government

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could reasonably be construed as favorable and material to the defendant’s guilt or punishment has been provided to the defendant in the form of summaries. Those summaries were provided to the Court on December 14, 2018; at that same time, the government provided the full interview reports to the court for *in camera* review.

has subsequently provided the defendant with access to the text messages, to the extent that they could reasonably be considered favorable and material to his sentencing. The text messages, however, are not exculpatory; they are impeaching of DAD Strzok. Moreover, both interviewing agents have been clear, since the beginning and in their documentation, that the defendant made false statements to them on January 24, 2017, about multiple topics.

Some of the remaining requests appear to be a blanket request for information, untethered on their face to any exculpatory information. *See, e.g.*, Mot. to Compel at 5-7 (Request ##9, 24, 26, 27, 33, 34, 36). Other requests pertain to information that does not exist. *See, e.g.*, Mot to Compel at 4-5 (Request ##5, 11). Where possible, the government has attempted to respond to the requests by assuming that they are intended to obtain exculpatory information among the listed materials, to the extent such materials exist. For all such requests, the government is not aware of any information that would be favorable and material to the defendant at sentencing.<sup>9</sup>

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<sup>9</sup> The defendant's requested relief, that the government be held in civil contempt, must be denied because the defendant has failed to demonstrate through clear and convincing evidence that the government failed to comply with the Court's Standing Order.

"[C]ourts have the inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). The civil contempt power "is essential to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (citation and quotation omitted). As the party moving for a civil contempt finding, the defendant bears the initial burden of demonstrating by clear and convincing evidence that: (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by the government; and (3) the government failed to comply with that order. *See Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F.Supp.2d 35, 38 (D.D.C. 2010) (*citing Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *SEC v. Bilzerian*, 112 F.Supp.2d 12, 16 (D.D.C. 2000)). "In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred." *Phillips v. Mabus*, 894 F.Supp.2d 71, 91 (D.D.C. 2012) (*quoting Breen v. Tucker*, 821 F.Supp.2d 375, 383 (D.D.C. 2011)).

The defendant has failed to meet his burden. As detailed here, the defendant has not even demonstrated that the government failed to comply with the Court's Standing Order, let alone

II. The Defendant's Objective Is Dismissal of this Case, Not to Identify Information that Would Be Favorable and Material to His Sentencing

Finally, it bears emphasis that the defendant's filings—although captioned as a motion to compel production of *Brady* material—are in fact an effort by the defendant to have his case dismissed. Since the beginning of their involvement, the defendant's new counsel have sought to get the charges dropped, professed their client's actual innocence, and perpetuated conspiracy theories, all while stating that the defendant does not intend to withdraw his guilty plea. Certainly, true and credible *Brady* violations in a case could justify sanctions and other remedies, to include dismissal. In *this* case, however, nothing could be further from the truth.

From the beginning, the defendant's new counsel have sought to get the charges against the defendant dropped. His new counsel's first outreach to the government was an effort to get the Department of Justice to dismiss the case. Before even entering an appearance in the case, new counsel sent a letter to the Attorney General and Deputy Attorney General requesting that the Attorney General "dismiss the prosecution of General Flynn" and remove the prosecutors from the case. *See* 6/6/2019 Defense Counsel Letter to the Attorney General at 2 ("June 6 Letter") (Attachment 1). Defense counsel then made some of the same discovery requests that they made in the instant motion. Despite recently professing to the Court that they still need "a significant amount of time" to complete their review of information, *see* Joint Status Report, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Aug. 30, 2019) (Doc. 107), defendant's new counsel needed no time to request that the case be dismissed and the prosecutors removed. Defense counsel did not need to complete their review of the facts to make their request, because

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that any such non-compliance was clear and convincing. The government has made every effort to comply with the Court's Standing Order, tendering more than 22,000 pages of material, including material directly in response to the defendant's questions. Accordingly, the defendant's request should be summarily denied.

their request did not rely on facts. With the same set of facts in December 2018, the defendant and his former counsel represented to the Court that they did not believe any other helpful information needed to be produced. *See* 12/18/2018 Hearing Tr. at 8-9. Confirming that the defendant and his new counsel are in search of a result, not the facts, defense counsel was recently interviewed on television and exclaimed, “I’m expecting, frankly, that we find evidence that warrants dismissal of the case for egregious government misconduct.” Interview by Lou Dobbs Tonight with Sidney Powell, Fox Bus. (Aug. 30, 2019), <https://video.foxbusiness.com/v/6081729582001/#sp=show-clips> at 6:09. Defense counsel made the same admission to the Court at the Status Conference on September 10, 2019. *See* 9/10/2019 Status Conf. Tr. at 16 (“To show that the entire prosecution should be dismissed for egregious government misconduct and long-time suppression of *Brady* material.”)

Lest there be any doubt about the defendant and his counsel’s objective, the Court need only read the first page of their Brief in Support, which references an article, “*Why Innocent People Plead Guilty.*” Brief in Support at 1 n.1; *see also id.* at 7 n.9 (“Mr. Flynn may also have other defenses that prior counsel did not explore.”). In that same Fox Business interview, defense counsel protested that the defendant, “I believe, from everything I’ve seen now, should be completely exonerated.” Interview by Lou Dobbs Tonight with Sidney Powell, Fox Bus. (Aug. 30, 2019), <https://video.foxbusiness.com/v/6081729582001/#sp=show-clips> at 6:50. All this despite the fact that the defendant has twice admitted his guilt, before two federal judges.

Relatedly, the defendant’s arguments are premised on conspiracy theories. *See, e.g.*, June 6 Letter at 3 (“[I]t is increasingly apparent that General Flynn was targeted and taken out of the Trump administration for concocted and political purposes”); Brief in Support at 2 (“While prosecutors routinely recite their full knowledge of and compliance with their *Brady* obligations,

in truth they often scoff at them and continue to play games to win convictions at all costs").<sup>10</sup>

The motion's most frequent target is the Special Counsel's Office. For example, the defendant and his counsel allege that the Special Counsel's Office manipulated or controlled the press. *See* Brief in Support at 4; June 6 Letter at 5-6 ("The General's plea was heavily manipulated while Brady evidence was suppressed, and the press was complicit"). The claim is divorced from facts and reality. The motion even attacks attorneys in the Special Counsel's Office who had no role in the criminal investigation of the defendant. *See* Brief in Support at 4. Similarly, the defendant spends more time citing irrelevant cases, such as Ted Stevens and Adam Lovinger, than reviewing the facts of this case. *See id.* at 2, 6, 7, 9, 10, 14-16. The defendant even alleges that there have been "egregious" Fourth Amendment violations,<sup>11</sup> but makes a list of claims unconnected to this case or the evidence on which the government relies. *Id.* at 8.

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<sup>10</sup> Tellingly, one of the defendant's requests was suggested by the aforementioned HPSCI staff member, "to get it out there on Fox." *See* Email from Barbara Ledeen to Robert Kelner (Dec. 13, 2018, 12:21 AM EST), "Re: From Derek Harvey from HIPSI [sic]" (Attachment 2); Mot. to Compel at 5 (Request #13).

<sup>11</sup> Unsurprisingly, the defendant's discussion of the Fourth Amendment makes no mention of the defendant's plea agreement, where the defendant waived the right "to challenge the admissibility of evidence offered against [him]," Plea Agmt at 6, or Judge Contreras' warning to the same effect during the defendant's first guilty plea. 12/1/2017 Hearing Tr. at 9 ("You would have the right to challenge the government's case against you by seeking to have the charges dismissed or having the evidence against you suppressed or thrown out. Do you understand you would have that right if you did not waive them?").

## CONCLUSION

The defendant's motion is not a search for *Brady* material. It is a fishing expedition in hopes of advancing conspiracy theories related to the U.S. government's investigation into Russian interference in the 2016 presidential election. The government has already provided any evidence that could reasonably be construed as favorable and material for the defendant at sentencing. Accordingly, the motion should be denied.

Respectfully submitted,

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By: \_\_\_\_\_ /s/

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Dated: October 1, 2019

**CERTIFICATE OF SERVICE**

I, Brandon L. Van Grack, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for the defendant on October 1, 2019.

/s/  
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